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Via Mail

The Honorable Ben Carson
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Dana T. Wade
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U.S. Department of Housing
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451 7th Street S.W.
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Re: Extending the Currently-Existing Moratorium for Foreclosures on FHA-Backed Mortgages

Dear Ms. Wade:

We write on behalf of the New York City Bar Association to address your agency's efforts to grant relief to Puerto Rican families with FHA-backed mortgages on their homes located in Puerto Rico. Pursuant to your letters dated September 11, 2017 and October 20, 2017, you have granted a temporary moratorium on foreclosures due to the extensive damage caused by Hurricane Maria. However, the current moratorium you have granted is set to expire on March 19, 2018. In light of the devastating damage caused by Hurricane Maria—which has caused ongoing power outages that have created unique difficulties for homeowners attempting to pay off their mortgages—we request that you grant a further extension of this moratorium for an additional twelve months. We understand that Senators Marco Rubio (R-FL), Catherine Cortez Masto (D-NV), Bill Nelson (D-FL), and Robert Menendez (D-NJ) have requested similar relief, and we join in that request.¹

Your agency has already acknowledged that it has the power to grant similar extensions, and we believe that such relief here would be in alignment with HUD's mission to "protect consumers" in Puerto Rico who—through no fault of their own—have been impacted by both

¹ We also join in the Senators' request to extend the moratorium granted by Fannie Mae and Freddie Mac, which is currently set to expire on March 31, 2018.

natural disasters and financial crisis.² Moreover, we believe that this relief would prevent needless errors in the foreclosure process, avert potential foreclosure “rescue” scams, and benefit the federal government by preserving FHA Insurance Funds.

I. The Foreclosure Problem Requires Immediate Assistance

A. Hurricane Maria Has Substantially Exacerbated the Already-Existing Foreclosure Crisis

Home foreclosures were a significant problem affecting residential properties located in Puerto Rico even before the most recent hurricane hit. As of June 21, 2017, an average of 14 families lost their homes every day due to foreclosures.³ From 2009 through 2016, local courts oversaw foreclosures on nearly 33,000 homes and, as of this past summer, more than 17,000 such homes were in the process of foreclosure in local courts.⁴

The recent hurricane has only exacerbated the problem. By December 16, 2017, “about one-third of the island’s 425,000 homeowners [we]re behind on their mortgage payments to banks and Wall Street firms that previously bought up distressed mortgages.”⁵ The data firm Black Knight, Inc. has discovered that “90,000 borrowers became delinquent as a consequence of Hurricane Maria.”⁶

This problem is both severe and unprecedented. Puerto Rico’s thirty-five percent foreclosure and delinquency rate—as of December 2017—is more than double what the national average was during the worst of the housing market collapse in January 2010.

B. The Originating Puerto Rican Banks Have Substantially Sold Off Their Mortgage Portfolio to Outside Investors

To their credit, the Puerto Rican banks that originated mortgages on the island have made some attempts to avoid foreclosures in recent years. According to the Associated Press, “local banks since 2009 have implemented more than 176,000 alternatives to foreclosure worth \$19 billion, including restructurings and refinancing.”⁷

² On February 23, 2006, for instance, HUD issued Mortgagee Letter 2006-05 in the context of Hurricanes Katrina, Rita and Wilma stating that “HUD is extending the foreclosure moratorium for an additional 120 days.” This is just one example of the many extensions of foreclosure moratoriums that HUD has granted in the past, in service of the agency’s mission statement. See HUD Missions Statement, available at <https://www.hud.gov/about/mission>; see also Mortgagee Letter 2013-11 available at <https://www.hud.gov/sites/documents/13-11ML.PDF>. We respectfully submit that, at the very least, HUD should extend the moratorium by a minimum of 120 days.

³ Associated Press, *Puerto Rico families fight, flee a surge in foreclosures*, June 21, 2017, available at <https://www.apnews.com/d08c6338fe334b42b39b8035119c68ad>.

⁴ *Id.*

⁵ Goldstein, Matthew, *The Next Crisis for Puerto Rico: A Crush of Foreclosures*, N.Y. Times, Dec. 16, 2017, available at <https://www.nytimes.com/2017/12/16/business/puerto-rico-housing-foreclosures.html>.

⁶ *Id.*

⁷ See, *supra*, Footnote 3.

Now, however, it appears that many of the mortgages that these Puerto Rican banks held have been sold to third parties. As of June 2017, banks in Puerto Rico had reportedly “sold more than 70 percent of their mortgage portfolio on the secondary market.”⁸ These mortgages appear to have been sold to outsiders who may not be so willing to accept restructurings and refinancing in lieu of foreclosures.⁹

C. The Outside Investors Who Purchased These Mortgages Have Been Aggressively Foreclosing on Homeowners in Puerto Rico

According to a *New York Times* article from October 9, 2017, several outside investors have viewed the island’s recent economic troubles “as an investment opportunity.”¹⁰ In brief, these outside investors have reportedly gone to Puerto Rico “in search of bargains” on “distressed real estate loans.” And as these outside investors have appeared on the scene, the number of foreclosure actions has spiked dramatically.¹¹ Simply put, outside investors have purchased distressed mortgages secured by Puerto Rico residential property for just pennies on the dollar, and are now seeking to collect the full amounts from their Puerto Rican mortgagor-homeowners. Although the current moratorium on FHA-insured mortgages has temporarily prevented these investors from moving forward with some foreclosures, Hurricane Maria has created a unique situation where homeowners are at an extreme disadvantage relative to those mortgage loan servicers seeking foreclosure, due to both macroeconomic forces and acts of nature that are outside of their control.¹²

⁸ *Id.*

⁹ For instance, one complaint that was filed with the Consumer Financial Protection Bureau in Puerto Rico (#1460879) states that a mortgage loan servicer immediately brought a foreclosure lawsuit against a homeowner for the principal amount after acquiring the mortgage. When the borrower sought modification, he/she was told that the servicer would not be flexible, and that they “just want to acquire the home to buil[d] their house portfolio.” Available at <https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp>.

¹⁰ Goldstein, Matthew, *Wall Street Firms Gambled on Puerto Rico. They’re Losing.*, N.Y. Times, Oct. 9, 2017, available at <https://www.nytimes.com/2017/10/09/business/wall-street-paulson-puerto-rico-hedge-funds.html>.

¹¹ For instance, El Nuevo Día examined foreclosure filings on the island, and found that as these outside investors appeared, the rate of foreclosure actions has “multiplied exponentially.” Gotay, Benjamin Torres, *El dolor de perder la casa (The Pain of Losing the House)*, El Nuevo Día, Jul. 23, 2017, available at <https://www.elnuevodia.com/negocios/economia/nota/eldolordeperderlacasa-2342742/>.

¹² It should be emphasized that this letter only focuses on the issue of FHA-insured mortgages. There are many other Puerto Rican mortgages owned by outside investors and their representatives, and the actions taken in the wake of Hurricane Maria are instructive when it comes to forecasting the fate of the mortgages at issue here. For instance, *Newsweek* reported that certain outside investors instituted new foreclosure proceedings just days after the hurricane hit. What’s more, by October 5, 2017, a single outside investor “had made more than 100 separate motions in Puerto Rican courts to move foreclosure cases forward, in many cases seeking judgments against homeowners who may not even know they are being foreclosed on.” Varona, Julio López, *Puerto Rico Can’t Afford Another Crisis, It Needs a Moratorium on All Foreclosures*, *Newsweek*, Jan. 22, 2018, available at <http://www.newsweek.com/puerto-rico-cant-afford-another-crisis-it-needs-moratorium-all-foreclosures-785850>.

D. Hurricane Maria Has Left Puerto Rican Families Vulnerable to Potentially Illegal and Erroneous Foreclosure Practices by Mortgage Loan Servicers

In the wake of the most recent housing market collapse in the United States, it was revealed that certain mortgage loan servicers had engaged in illegal and improper behavior to force homeowners out of their homes. Various state and federal agencies conducted investigations into the issue, finding circumstances where mortgage loan servicers “improperly calculated loan balances, misapplied borrower payments, failed to correctly process escrow and insurance payments, and failed to properly investigate and make corrections in response to consumer complaints.”¹³ Servicers have further engaged in the practice of “illegally foreclosing upon borrowers’ loans” and “selling loan servicing rights to servicers without fully disclosing or correcting errors in borrowers’ loan files.”¹⁴

There are currently indications that some of these same practices are happening in Puerto Rico, where there are numerous complaints that servicers have frequent internal miscommunications, misplaced documents, charged improper late fees, and generally given homeowners the run-around when they sought mortgage modifications.¹⁵ Improper documentation appears to be an ongoing problem. Moreover, some servicers have been accused of engaging in a process called “dual tracking,” whereby the servicers purport to pursue loan modifications (in order to take advantage of certain incentive fees offered by the federal government), while simultaneously pursuing foreclosures.¹⁶ There are also reports of mortgage loan servicers sending foreclosure notices in English rather than Spanish, and placing notices of default in newspapers where they are unlikely to be seen. A review of the Consumer Financial Protection Bureau’s database reveals just a sampling of the numerous complaints that have been generated with respect to alleged mortgage foreclosure irregularities in Puerto Rico.¹⁷

We raise these issues to highlight the vulnerability of Puerto Rican homeowners at this point in time, not to generally disparage the mortgage loan servicing industry. We also note that, to the extent that any of these issues have historically been caused by error rather than fraud, this only serves to further justify the extension of the foreclosure moratorium.¹⁸ HUD has already

¹³ *Consumer Financial Protection Bureau v. Ocwen Financial Corp.*, 17-cv-80496 (S.D. Fla. Apr. 20, 2017); *see also* THE FINANCIAL CRISIS INQUIRY REPORT at p. 405-06 (noting that “servicers persistently disregarded” applications for mortgage modifications, and that “servicers may receive substantial fees for guiding a mortgage through the foreclosure process, creating an incentive to deny a modification”).

¹⁴ *Id.*

¹⁵ *Maura, et al. v. Scotiabank, et al.*, 17-cv-2263 (D.P.R. Oct. 27, 2017)

¹⁶ *Id.* (alleging improper “dual tracking” and “robo-signing”); *see also* Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses, Feb. 9, 2012 (explaining the practice of robo-signing), *available at* <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest>

¹⁷ CFPB Consumer Complaints Database, *available at* <https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp>

¹⁸ CFPB Rules Establish Strong Protections for Homeowners Facing Foreclosure: New Rules Prevent Servicer Surprises and Runarounds for Mortgage Borrowers, Jan. 17, 2013 (discussing “dual tracking”), *available at*:

noted in the past that “borrowers affected by a disaster will experience difficulty in providing traditional documentation,” let alone the full set of documentation that is needed to contest a foreclosure proceeding.¹⁹ We anticipate that these errors would only be compounded in the case of Puerto Rico, where—as of this writing—more than 400,000 U.S. citizens do not have electricity.²⁰

E. The Expiration of the Moratorium Will Lead to a Surge of Foreclosures

Once the moratorium on foreclosures expires on March 19, 2018, “lawyers and housing counselors expect that [it will] trigger a surge in foreclosures.”²¹ This has led to “confusion and panic” among Puerto Rican homeowners residing on the island.²² Many commentators have reported that the power outages caused by Hurricane Maria, and various other social and economic factors, have created a unique situation where the island is poised to see a dramatic and destabilizing surge in foreclosures when the moratorium is lifted.²³

F. A Surge in Foreclosures Would Further Depress the Puerto Rican Economy

It is no secret that, at this moment, the economy of Puerto Rico is deeply troubled, and that Hurricane Maria has severely exacerbated this condition. Families struggle every day; many people who would otherwise make timely mortgage payments are unable to do so, because they are spending a larger portion of their budget on power generators, and other expenses that are necessary to recover from a natural disaster. Many of them have even lost their jobs because of Hurricane Maria’s effects.

In short, these are not normal times. To allow a wave of home foreclosures to happen now would be both cruel and economically destabilizing.

<https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rules-establish-strong-protections-for-homeowners-facing-foreclosure/>

¹⁹ See Mortgagee Letter 2006-1. Similarly, the government of Puerto Rico has recognized more generally that “[t]he citizenry in general is not well aware of the technicalities and complex processes entailed by the legal obligations incurred under a mortgage loan.” See P.R. Law No. 184 (Statement of Purpose).

²⁰ Jervis, Rick, *5 Months Without Power*, USA Today, Feb. 14, 2018, available at <https://www.usatoday.com/story/news/2018/02/12/power-outage-puerto-rico-latest-snap-islands-long-recovery-hurricane-maria/329322002/>

²¹ Goldstein, Matthew, *The Next Crisis for Puerto Rico: A Crush of Foreclosures*, N.Y. Times, Dec. 16, 2017 available at <https://www.nytimes.com/2017/12/16/business/puerto-rico-housing-foreclosures.html>.

²² Associated Press, *Temen que el fin de las moratorias desemboque en una ola de deshaucios (They fear that the end of the moratoriums will lead to a wave of evictions)*, Jan. 24, 2018, available at <https://www.apnews.com/e35a7fa5d1984ac18cd34a869943fc67>.

²³ *Id.*; see also Varona, Julio López, *Puerto Rico Can’t Afford Another Crisis, It Needs a Moratorium on All Foreclosures*, Newsweek, Jan. 22, 2018 (“Too many in Puerto Rico still lack a job, have homes with no roof, electricity or clean water. Under those conditions, it is impossible and inconceivable to expect them to pay for a mortgage.”) Available at <http://www.newsweek.com/puerto-rico-cant-afford-another-crisis-it-needs-moratorium-all-foreclosures-785850>

II. Federal Guidance Could Provide Needed Relief to Struggling Homeowners

A. Extending the Moratorium on Foreclosures Would Provide Needed Relief to Homeowners and to the Federal Government

In this letter, we are only requesting that the current moratorium be extended for a limited period of time to protect vulnerable Puerto Rican families from losing their homes during this temporary crisis. It would provide them the breathing room that they need to get back on their feet as the conditions in Puerto Rico improve, and it would help to stabilize their communities and lives during this time of crisis.²⁴

Importantly, this relief would also benefit HUD. This is because, as HUD has previously noted, when foreclosures are prevented, it “not only allows families to retain homeownership, it also significantly reduces the financial impact of foreclosure claims against the FHA Insurance Funds.”²⁵ Therefore, an extension of the foreclosure moratorium would benefit both Puerto Rican homeowners and HUD.²⁶

B. Federal Guidance Could Assist Homeowners to Remain in Their Homes

On August 16, 2004, HUD provided the following guidance to mortgage servicers who had been seeking to foreclose on homeowners who had been affected by natural disasters:

In addition to the moratorium, **HUD strongly recommends** servicing actions for homeowners whose properties were directly affected by the disaster. This includes **such actions as special forbearance, mortgage modification, refinancing, and waiver of late charges.** HUD also offers a partial claim program to help address problems of unresolved arrearages. **Subsequent to the foreclosure moratorium, lenders are encouraged to consider alternatives to foreclosure** such as pre-foreclosure sales and deeds in lieu of foreclosure if the

²⁴ Notably, *even some of the servicers* favor an extension of the moratorium. See Marcus, Samantha, *Can N.J.'s public pension fund help ease Puerto Rican foreclosure crisis?*, February 2, 2018 (“Given that (Finance of America's reverse mortgage division) does not have control over foreclosure timelines with respect to insured loans, **we believe the best outcome for homeowners in this area would be an extension of HUD's foreclosure moratorium** and intend to advocate for this extension directly to HUD”). http://www.nj.com/politics/index.ssf/2018/02/can_nj_public_pension_fund_help_ease_puerto_rican.html

²⁵ On April 26, 2005, HUD issued Mortgagee Letter 2005-18, stating that it would imitate certain loss mitigation procedures “in an effort to provide maximum opportunities for Federal Housing Administration (FHA) insured borrowers to retain homeownership.” Additionally, the act of protecting homeowners from foreclosure, and reducing the claims made against FHA-insured funds, “ultimately reduce[s] the mortgage insurance premiums paid by all FHA-insured borrowers.” https://www.hud.gov/program_offices/administration/hudclips/sfhsuperseded/mltrs_full#2005

²⁶ In the past few years, HUD has implemented a tiered ranking system (“TRSII”) by which it ranks servicers according to, among other things, their efforts at “foreclosure prevention.” See U.S. Department of Housing and Urban Development, *Tier Ranking System (TRS) II Servicer Narrative*, FY2017 Update. Notably, one of the most active servicers foreclosing on homes in Puerto Rico has received near-failing “Tier 3” grades from HUD itself in the past three reporting cycles. See U.S. Department of Housing and Urban Development, *HUD's Tier Ranking System II (TRSII)*, Incentive Round No. 2-4.

homeowner is not in a position to “cure” the mortgage delinquency. (*Emphasis added*).

On April 11, 2013, HUD issued even stronger guidance, instructing that servicers must “**make every effort** to communicate with and assist affected borrowers in rebuilding or repairing damaged properties, minimizing delinquencies and retaining homeownership.”²⁷ In evaluating affected homeowners, servicers “**must** review the individual facts and circumstances of each case and take into consideration the adverse impact that property damage, uninsured losses, curtailment of income and extraordinary expenses related to the disaster are having on the ability of the borrower(s) to make on-time mortgage payments.” What’s more, “servicers **must** provide borrowers with forbearance and other loss mitigation alternatives” in appropriate circumstances, and “should suspend reporting of delinquencies to credit repositories for borrowers” who have fallen behind in their payments.

In light of the aggressive foreclosure practices that have been experienced within Puerto Rico, we request that HUD provide the same guidance that advises servicers that they must seek alternatives to foreclosure in Puerto Rico, must take into account the particular circumstances of Puerto Rican residents affected by the hurricane, and must refrain from reporting delinquencies to credit agencies.

In addition to the guidance outlined above, we further request that HUD provide guidance that mortgage loan servicers make every effort to meet with mortgagors that do not respond to their correspondence, rather than seeking default judgments against them. The hurricane has made communication on the island difficult, with many residents seeking temporary shelter elsewhere.

Finally, we request that HUD provide guidance to investors who purchased Puerto Rican mortgages at significant discounts. For these investors, we urge HUD to make a recommendation—in the strongest language possible—that loss mitigation, including mortgage loan modifications, should be a first priority and that investors should accept every modification they can manage. By purchasing mortgages under the current circumstances, these investors have already accepted that there is some risk of reduced payment. Indeed, that is why they were able to purchase the mortgages at “bargain” prices in the first place.²⁸

III. Conclusion

This foreclosure crisis is a major problem in Puerto Rico. As mentioned previously, the foreclosure rate on the island is already more than double what it was at the worst point of the U.S. housing market collapse, and this appears to be a significant factor behind the current migration from the island. Although an extension of the moratorium is not a complete solution of this matter, it will at least grant some temporary relief to a limited number of homeowners in Puerto Rico who have been impacted by Hurricane Maria. We hope that the requested relief will

²⁷ See Mortgagee Letter 13-11. <https://www.hud.gov/sites/documents/13-11ML.PDF>

²⁸ Goldstein, Matthew, *Wall Street Firms Gambled on Puerto Rico. They’re Losing.*, N.Y. Times, Oct. 9, 2017, available at <https://www.nytimes.com/2017/10/09/business/wall-street-paulson-puerto-rico-hedge-funds.html>

give homeowners a second chance, and give them the space that they need to navigate the complex—sometimes Kafkaesque—foreclosure process.

We thank you for your cooperation, and look forward to working with you to provide foreclosure relief to Puerto Rican homeowners.

Respectfully submitted,



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President, New York City Bar Association



Roger Juan Maldonado
Chair, New York City Bar Association
Task Force on Puerto Rico

CC:

New York Congressional Delegation
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Representative Darren Soto
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Representative Norma Torres
Representative Jeb Hensarling
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Representative Sean Duffy
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